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PROBATE LAW

LIFETIME REMEDIES FOR BREACH OF A CONTRACT TO MAKE A WILL

I. INTRODUCTION

A contract to make a will is a common device by which an individual promises to will property to a friend or relative if that friend or relative will perform services during the individual's lifetime. These services can include taking care of property, running a business while the individual is incapacitated, or caring for an individual during old age.[1] This type of arrangement is a valid, enforceable contract.[2]

Although many people may feel morally obligated to help a loved one or friend during old age, this arrangement can generate numerous problems. The problems usually begin when the relationship between the parties deteriorates. A family member may have devoted years to caring for an elderly relative in expectation of land or personal property only to be disinherited because of a subsequent disagreement. Additional problems occur when a party sues for breach of contract. Because a contract to make a will contains elements of both contract and testamentary law, it is sometimes difficult for a court to fashion a remedy—particularly when the promisor is still alive.

The South Carolina Court of Appeals recently applied an unusual

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1. *See, e.g.*, Wright v. Patrick, 262 S.C. 434, 437, 205 S.E.2d 175, 176 (1974) (involving a grandmother's promise to will property to her granddaughter in return for the granddaughter's promise to care for her grandmother and to help her in her business); Footman v. Sweat, 247 S.C. 172, 176, 146 S.E.2d 624, 626 (1966) (per curiam) (involving a grand aunt's promise to will property to her grand niece in return for the niece's promise to take care of her aunt and to provide for her until death); Brown v. Graham, 242 S.C. 491, 492, 131 S.E.2d 421, 422 (1963) (involving a father's promise to will his 145-acre farm to his illegitimate sons in return for their promise to "operate his farm or assist him if he became ill and to help him in the conduct of his business generally"); Kerr v. Kennedy, 105 S.C. 496, 498, 90 S.E. 177, 177 (1916) (involving a mother's promise to will property to her sons in return for their promise to "live near by or with her, take care of her during her lifetime, manage her property for her, and give her all the care and attention which she might require"); *see also* Ozgur K. Bayazitoglu, Comment, *Applying Realistic Statutory Interpretation to Texas Probate Code § 59A—Contracts Concerning Succession*, 33 HOUS. L. REV. 1175, 1179 (1996) ("Typically, a contract to make a will is predicated on the following exchange: The testator promises to devise property to another in exchange for a promise that the testator will be taken care of for life."); Amy Sapper Poling, Comment, *Protecting the Interests of Children of Divorce: A Proposal to Create Exceptions to the Louisiana Prohibition Against Contracting for Future Successions*, 72 TUL. L. REV. 1853, 1868 (1998) ("One of the most controversial [types of contracts to make a will] involves contracts with the elderly for services or companionship.").

2. Caulder v. Knox, 251 S.C. 337, 344, 162 S.E.2d 262, 266 (1968); BERTEL M. SPARKS, CONTRACTS TO MAKE WILLS 1-2 (1956).

remedy for a breach of a contract to make a will in *Wright v. Trask*.[3] The case is unusual for two reasons. First, the suit was brought during the testator's lifetime.[4] Second, the court ordered the defendant to make a will conforming to the contract with questionable supporting authority and in opposition to established common-law principles.[5]

Part II of this Note outlines the facts and holding of *Wright*. Part III discusses contracts to make a will in general, examines the traditional remedies available for breach of a contract to make a will, and demonstrates that the remedy applied in *Wright* is susceptible to strong criticism. Instead of compelling the promisor to make a will, the court should have considered placing a constructive trust on the property in favor of the promisee.

II. FACTUAL AND PROCEDURAL BACKGROUND OF *WRIGHT V. TRASK*

Neil Trask owned a cattle ranch in Abbeville, South Carolina, and desired to pass his ranch and knowledge of cattle breeding to someone else before he died.[6] In 1983 he asked his grandson, James Wright, Jr., to move to the ranch and learn the art of cattle breeding.[7] In return, Trask promised his grandson that the ranch would be Wright's after Trask died.[8] Wright, who was planning to take over his family's "thriving" meat packing business with his stepbrother, agreed to quit his job at the meat packing plant and to move with his family to his grandfather's ranch.[9]

Wright managed the ranch for over twelve years.[10] He made many improvements, such as repairing fences, and learned from his grandfather how to improve the herd.[11] Wright worked for low wages, sometimes working "from sunup to sundown, seven days a week."[12] By all accounts he did an excellent job managing the ranch.[13] Trask often would publicly boast how well his grandson managed the ranch.[14] He executed several wills, leaving increasing

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3. 329 S.C. 170, 495 S.E.2d 222 (Ct. App. 1997).

4. *Id.* at 173, 495 S.E.2d at 223. *See generally* Coleman Karesh, *Wills*, 8 S.C. L.Q. 150, 157 (1955) ("The usual case involves action by the disappointed promisee after the promisor has died."). For another case brought during the lifetime of the promisor, see *Harmon v. Aughtry*, 226 S.C. 371, 85 S.E.2d 284 (1955).

5. *See Wright*, 329 S.C. at 183-84, 495 S.E.2d at 229; *infra* note 43 and accompanying text (discussing the established principle that a person cannot be forced to make a will); *infra* notes 82-86 and accompanying text (discussing the authorities cited in *Wright* and how these authorities do not support compelling a party to make a will).

6. *Wright*, 329 S.C. at 173, 495 S.E.2d at 224.

7. *Id.*

8. *Id.* at 176, 495 S.E.2d at 225.

9. *Id.* at 173-74, 495 S.E.2d at 224.

10. *Id.* at 182, 495 S.E.2d at 228.

11. *Id.* at 174, 495 S.E.2d at 224.

12. *Id.*

13. *Id.* at 182, 495 S.E.2d at 228.

14. *Id.*

amounts of the ranch to Wright.[15] In 1991 he revised his will leaving all the cattle, land, and equipment to Wright.[16]

After Trask's health began to decline in 1994, his grandson took control of the ranch.[17] Wright's wife also devoted time caring for Trask's needs.[18] When Trask became unhappy with the way Wright was running the ranch, he fired his grandson and changed his will to disinherit him.[19] Wright subsequently brought a suit against his grandfather seeking damages and claimed his grandfather breached their oral contract to make a will.[20]

A master-in-equity from the Circuit Court of Anderson County concluded Trask should specifically perform the contract by executing and not revoking a will leaving the cattle, land, and equipment to his grandson.[21] The master also enjoined Trask from transferring or encumbering any of the subject property.[22] Finally, the master ordered that Wright return as manager of the ranch.[23] The South Carolina Court of Appeals affirmed this decision.[24]

III. ANALYSIS

A. Pre-Probate Code Common Law

According to common law, a contract to make a will is an enforceable contract right.[25] However, two separate entities are involved: a contract and a will.[26] This combination has been the source of much confusion.[27] To be enforceable, a contract to make a will must contain all of the following essential contractual elements: a contractual intent, a meeting of the minds, and

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15. *Id.* at 174-75, 495 S.E.2d at 224.
16. *Id.*
17. *Id.* at 175, 495 S.E.2d at 224.
18. *Id.*
19. *Id.* at 175, 495 S.E.2d at 224-25.
20. *Id.* at 173, 495 S.E.2d at 223.
21. *Id.* at 170, 173, 495 S.E.2d at 222, 223.
22. *Id.* at 173, 495 S.E.2d at 223.
23. *Id.*
24. *Id.* at 173, 495 S.E.2d at 224.
25. Corontzes v. Trapalis, 259 S.C. 244, 249, 191 S.E.2d 523, 525 (1972); Caulder v. Knox, 251 S.C. 337, 344, 162 S.E.2d 262, 266 (1968); SPARKS, *supra* note 2, at 1 ("As early as 1682 the validity of a contract to leave property at death of the promisor was accepted without question."); *id.* at 2 ("'No proposition is better settled than that a contract to leave by will is good.'" (quoting Walpole v. Orford, 30 Eng. Rep. 1076, 1081 (1797))); GEORGE W. THOMPSON, THE LAW OF WILLS § 16, at 32 (3d ed. 1947).
26. S. Alan Medlin, *Result-Oriented Interpretations of the South Carolina Probate Code Create Estate of Confusion,* 44 S.C. L. REV. 287, 339-40 (1993); Poling, *supra* note 1, at 1868; John E. Johnston, Jr., Recent Case, 7 S.C. L.Q. 656, 656 (1955).
27. Poling, *supra* note 1, at 1868; Johnston, *supra* note 26, at 656.

valid mutual consideration.[28] The contract does not have to fulfill the requirements of a valid will.[29]

However, a heightened burden of proof is required to establish an oral contract to make a will.[30] A contract to make a will must be established by "clear, cogent, and convincing evidence."[31] This high burden of proof is required for several reasons. First, the right to make a will and to dispose of property is fundamental.[32] Second, if the contract is an oral contract it is more difficult for the court to ascertain what the terms of the contract are and whether the contract actually exists.[33] The evidence must carry an "irresistable conviction to the mind that such a contract actually existed."[34] Finally, the promisor may be deceased, making the existence of the contract more difficult to determine.[35]

B. South Carolina Probate Code Section 62-2-701

In 1987 the enactment of the South Carolina Probate Code changed the common law of contracts to make wills by eliminating oral contracts.[36] Section

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28. *Wright*, 329 S.C. at 176, 495 S.E.2d at 225; *Corontzes*, 259 S.C. at 249, 191 S.E.2d at 525; *Caulder*, 251 S.C. at 344, 162 S.E.2d at 266; Brown v. Graham, 242 S.C. 491, 493, 131 S.E.2d 421, 422 (1963); Baylor v. Bath, 189 S.C. 269, 270-71, 1 S.E.2d 139, 140 (1938); THOMPSON, *supra* note 25, § 16, at 34.

29. THOMPSON, *supra* note 25, § 16, at 34 ("The agreement need not be executed with the formalities of a will.").

30. *Wright*, 329 S.C. at 176, 495 S.E.2d at 225; *Corontzes*, 259 S.C. at 249, 191 S.E.2d at 526; *Caulder*, 251 S.C. at 345, 162 S.E.2d at 266; Young v. Levy, 206 S.C. 1, 12, 32 S.E.2d 889, 893 (1945); *see* Footman v. Sweat, 247 S.C. 172, 177, 146 S.E.2d 624, 627 (1966) (per curiam); Hayes v. Israel, 242 S.C. 497, 500, 131 S.E.2d 506, 507 (1963); *Brown*, 242 S.C. at 493, 131 S.E.2d at 422; Dicks v. Cassels, 100 S.C. 341, 348, 84 S.E. 878, 879 (1915).

31. Havird v. Schissell, 251 S.C. 416, 418, 162 S.E.2d 877, 878 (1968) ("This court has held in cases too numerous to mention that when an oral contract to make a will is relied upon, it is necessary that such contract be established by clear, cogent and convincing evidence which carries irresistible conviction to the mind that such a contract actually existed . . . .").

32. Kerr v. Kennedy, 105 S.C. 496, 500, 90 S.E. 177, 178 (1916); *cf.* Lowe v. Fickling, 207 S.C. 442, 447, 36 S.E.2d 293, 294 (1945) ("A will is not a contract but a mere expression of intention to take effect after testator's death and subject in the meantime to revocation or such changes as the maker may deem expedient."); *Dicks*, 100 S.C. at 348-49, 84 S.E. at 879 ("It is a fixed principle of law that a will is revocable whenever the maker desires to change.").

33. *See Dicks*, 100 S.C. at 349-50, 84 S.E. at 879 ("'Such a contract, *especially when it is attempted to be established by parol*, is regarded with suspicion and not sustained, except upon the strongest evidence that it was founded upon valuable consideration and deliberately entered into by the decedent.'" (quoting McKeegan v. O'Neill, 22 S.C. 454, 468 (1884) (emphasis added))).

34. *Havird*, 251 S.C. at 418, 162 S.E.2d at 878.

35. *Dicks*, 100 S.C. at 350, 84 S.E. at 879 ("'The evidence comes from the living against the dead, who cannot speak in his own behalf . . . .'" (quoting Wilson v. Gordon, 73 S.C. 155, 160, 53 S.E. 79, 81 (1905))).

36. *See* S.C. CODE ANN. § 62-2-701 (Law. Co-op. Supp. 1998); Medlin, *supra* note 26, at 339.

62-2-701 provides:

> A contract to make a will or devise, or to revoke a will or devise, or not to revoke a will or devise, or to die intestate, *if executed after the effective date of this act*, can be established only by (1) provisions of a will of the decedent stating material provisions of the contract; (2) an express reference in a will of the decedent to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract and extrinsic evidence proving the terms of the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.[37]

In *Wright* the court concluded that section 62-2-701 did not apply because Wright and Trask entered the contract in 1983, when Wright agreed to move to his grandfather's ranch.[38] The court stated that the Probate Code's enactment in 1987 did not affect contracts entered into before that date.[39] If section 62-2-701 had applied in *Wright*, the contract would not have met the requirements of this statute and would have been unenforceable.[40] Currently, no reported South Carolina case has applied section 62-2-701.[41]

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37. S.C. CODE ANN. § 62-2-701(emphasis added).

38. 329 S.C. 170, 180-81, 495 S.E.2d 222, 227-28 (Ct. App. 1997).

39. *Id.* To support this decision the court quoted section 62-1-100(4) of the Probate Code, which states: "[A]n act done before the effective date in any proceeding and any accrued right is not impaired by this Code." S.C. CODE ANN. § 62-1-100(4) (Law. Co-op. Supp. 1998). However, using section 62-1-100(4) as authority seems unnecessary given that section 62-2-701 itself states that it applies only to contracts "executed after the effective date of this act." *Id.* § 62-2-701 (Law. Co-op. Supp. 1998).

40. *See Wright*, 329 S.C. at 180, 495 S.E.2d at 227 ("Wright readily admits the oral contract to make a will does not meet the legal requirements of Probate Code section 62-2-701.").

41. The South Carolina Court of Appeals ignored this statute in a recent case where it obviously applied. A wife promised her husband that she would not exercise the power of appointment contained in her husband's will, so that a trust would pass to his family. After the husband's death, she changed her will, leaving the trust to her family. The court enforced the promise, determining that a fiduciary relationship existed between the husband and wife and that the wife had violated her fiduciary duty to her husband. Chapman v. Citizens & S. Nat'l Bank, 302 S.C. 469, 395 S.E.2d 446 (Ct. App. 1990); Medlin, *supra* note 26, at 339-40.

C. *Remedies*

The problem with providing a remedy for contracts to make wills stems from their dual character: they possess elements of both contract and testamentary law.[42] It is a well-established principle that people have the right to leave property to whom they wish, and people cannot be forced to make or revoke wills.[43] However, the right being enforced in a contract to make a will is a contract right.[44] Many problems stem from the tension between these two aspects.[45] The *Wright* court confused the dual elements of a contract to make a will, leading to the inappropriate remedy of compelling Trask to make a will.[46]

1. *Remedies After the Promisor's Death*

Most suits in this area of the law occur after the death of the promisor.[47] Both legal and equitable remedies are available for breaches of these contracts.[48] With a legal remedy, a party receives monetary compensation for certain injuries.[49] Two legal remedies are available. First, the promisee can bring an action against the personal representative for breach of contract to

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42. *See* Poling, *supra* note 1, at 1868; Johnston, *supra* note 26, at 656.

43. Dicks v. Cassels, 100 S.C. 341, 348-49, 84 S.E. 878, 879 (1915) ("A person has a right ordinarily to leave his property to whom he pleases.... It is a fixed principle of law that a will is revocable whenever the maker desires to change."); Bruce v. Moon, 57 S.C. 60, 71, 35 S.E. 415, 419 (1900) ("[A]ny testamentary instrument is, by its nature, revocable . . . ."); THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 48, at 217 (2d ed. 1953) ("[T]he general view [is] that equity will not order [the] promisor to execute a will in accordance with the contract."); THOMPSON, *supra* note 25, § 16, at 36 ("Most courts hold that under such contracts the promisor can not be compelled to execute a will, nor can he be prevented from revoking one, since the contract is not treated as rendering an existing will irrevocable or as depriving the promisor of his legal testamentary rights."); Medlin, *supra* note 26, at 340 ("According to trust and estate law, a competent testator maintains the right to make, amend, or revoke a will until death."); Johnston, *supra* note 26, at 657 ("[E]quity will compel no one to make a will . . . ."); 81A C.J.S. *Specific Performance* § 207 (1977) ("[T]he court will not and cannot compel the testator to execute the promised will . . . .").

44. SPARKS, *supra* note 2, at 194 ("The important consideration to keep in mind is that whether the proceeding is at law or in equity the right being enforced is a right arising out of contract."); THOMPSON, *supra* note 25, § 16, at 35 ("Generally speaking, the validity of such contracts is determined by the ordinary law of contracts."); Bayazitoglu, *supra* note 1, at 1184.

45. *See* SPARKS, *supra* note 2, at 195; Poling, *supra* note 1, at 1868.

46. *See* SPARKS, *supra* note 2, at 96-97; *id.* at 127-28 ("Any attempt to affirmatively compel the execution of a will would appear destined to certain failure because of the inherent difficulties involved in compelling such an act . . . .").

47. ATKINSON, *supra* note 43, at 217; Karesh, *supra* note 4, at 157; *see, e.g.*, Corontzes v. Trapalis, 259 S.C. 244, 248, 191 S.E.2d 523, 525 (1972) (Moss, J., dissenting); Brown v. Graham, 242 S.C. 491, 494, 131 S.E.2d 421, 422 (1963).

48. *See generally* SPARKS, *supra* note 2, at 135-61 (discussing legal and equitable remedies for breach of a contract to make a will).

49. *See* 1A C.J.S. *Actions* § 124 (1985).

recover the value of what was promised.[50] Second, an alternative remedy of quantum meruit is available to recover the value of the services performed by the promisee.[51] An equity court, however, is better suited for handling contracts to make a will, and usually courts apply equitable remedies.[52] The main reason that courts apply equitable remedies in suits involving contracts to make wills seems to be the inadequacy of a remedy at law.[53] In equity, a court has wide discretion to fashion an appropriate remedy under the particular circumstances.[54] The most common remedy when a promisor dies intestate or with a will not conforming to the contract is the equitable remedy of specific performance.[55]

In a remedy of specific performance, the court compels a party to perform a contract.[56] When enforcing a contract to make a will, however, the remedy is not true specific performance because the promisor is dead and cannot be forced to do anything.[57] Rather, it is quasi-specific performance or relief in the nature of specific performance.[58] The remedy of quasi-specific performance reconciles "the differing goals of the laws of wills and contracts."[59] Traditionally, a testator has the right to either make whatever will he chooses during his lifetime or die intestate.[60] If a promisor dies intestate, or without a will conforming to the contract, equity will enforce the contract in the form of a constructive trust[61] against the testator's heirs, ensuring the promisee receives what is deserved.[62]

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50. ATKINSON, *supra* note 43, at 218.

51. *Id.*

52. SPARKS, *supra* note 2, at 136-37; *id.* at 146 ("[T]he bulk of the litigation in this field is found in chancery."). Some courts simply apply a general rule that equitable remedies apply to contracts to make a will. *See* Kerr v. Kennedy, 105 S.C. 496, 500, 90 S.E. 177, 178 (1916) ("There is no doubt that a contract of the character alleged in the pleadings in this case . . . will be enforced by a Court of equity."); Wright v. Trask, 329 S.C. 170, 183-84, 495 S.E.2d 222, 229 (Ct. App. 1997).

53. *See* SPARKS, *supra* note 2, at 150.

54. 1A C.J.S. *Actions* § 124 (1985).

55. *Wright*, 329 S.C. at 183-84, 495 S.E.2d at 229. However, the court in *Wright* misunderstood specific performance when applied to contracts to make wills. *See infra* notes 56-62 and accompanying text.

56. 81 C.J.S. *Specific Performance* § 2 (1977) ("Specific performance [is] an equitable remedy which compels the performance of a contract in the precise terms agreed on, or such a substantial performance as will do justice between the parties under the circumstances.") (footnote omitted).

57. Bruce v. Moon, 57 S.C. 60, 71, 35 S.E. 415, 418-19 (1900); 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 10.30, at 504 (1960); COLEMAN KARESH, WILLS 56 (1977); Johnston, *supra* note 26, at 657.

58. Johnston, *supra* note 26, at 657.

59. Medlin, *supra* note 26, at 340.

60. *See supra* note 43 and accompanying text.

61. *See infra* notes 107-09 and accompanying text.

62. *Bruce*, 57 S.C. at 71, 35 S.E. at 419; Medlin, *supra* note 26, at 340 ("[T]he compromise between the two policies is to probate whatever will, if any, was last executed by the decedent before death, but to effectively enforce the contract through the imposition of a

2. *Remedies During the Promisor's Life*[63]

As previously mentioned, most suits in this area of the law occur after the promisor's death.[64] Courts are faced with different problems when a suit is brought during the testator's lifetime. The remedy of quasi-specific performance is not available because it applies only after the testator's death.[65] In *Wright v. Trask* the promisee, Wright, sued for breach of contract during the lifetime of the promisor, Trask.[66] However, the court failed to make any explicit mention of this important aspect of the case. The court also failed to mention a South Carolina case, *Harmon v. Aughtry*, that established precedent for suits brought during a promisor's lifetime.[67] The law and the remedies are different when a suit is brought during a promisor's lifetime.

Most courts are reluctant to recognize a cause of action during a promisor's lifetime because the promisor has not breached the contract until death and because the promisor cannot be compelled to make a will.[68] However, both legal and equitable remedies are available in some circumstances.[69] With a remedy at law, a plaintiff seeks "immediate redress for the wrong of the defendant."[70] In *Harmon* the South Carolina Supreme Court recognized the legal remedy of anticipatory breach of a contract to make a will during the testator's lifetime.[71] The court stated:

> Since no breach of a contract of this kind can be assured as long as the promisor lives, ordinarily no cause of action accrues until his death. A will in accordance with the contractual obligation may be made at any time during the life of the promisor. However, . . . if in his lifetime the promisor repudiates the agreement, or puts it out of his power to perform, as by a conveyance of

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constructive trust.").

63. For a more detailed discussion of different legal and equitable remedies that states have applied during the promisor's lifetime in contracts to make wills, see H.A. Wood, Annotation, *Remedies During Promisor's Lifetime on Contract to Convey or Will Property at Death in Consideration of Support or Services*, 7 A.L.R.2d 1166 (1949).

64. *See supra* note 47 and accompanying text.

65. *See supra* notes 57-62 and accompanying text.

66. 329 S.C. 170, 175, 495 S.E.2d 222, 225 (Ct. App. 1997).

67. 226 S.C. 371, 85 S.E.2d 284 (1955).

68. Estate of Housely v. Haywood, 65 Cal. Rptr. 2d 628, 637 (Ct. App. 1997); *Harmon*, 226 S.C. at 375, 85 S.E.2d at 285; Bruce v. Moon, 57 S.C. 60, 71, 35 S.E. 415, 418-19 (1900); ATKINSON, *supra* note 43, at 219; Karesh, *supra* note 4, at 158; Johnston, *supra* note 26, at 656.

69. *See* Wood, *supra* note 63, at 1166.

70. SPARKS, *supra* note 2, at 85.

71. 226 S.C. at 375, 85 S.E.2d at 285-86.

> the property involved to a third person, such conduct may be treated as an anticipatory breach and an action for appropriate relief may be immediately maintained by the promisee against the promisor.[72]

Other states similarly have allowed a cause of action during the lifetime of the promisor based on anticipatory breach of contract.[73]

With an equitable remedy, "the plaintiff is usually seeking the aid of the court to protect an interest in particular assets whose conveyance to him is due at a future time."[74] Courts will enforce the equitable remedy of an injunction to restrain the inter vivos transfer of property subject to the contract.[75] Courts have also granted injunctions allowing the promisee to continue performing contractual obligations.[76] In addition, a court can place a constructive trust on the property during the lifetime of the promisor.[77]

In *Wright v. Trask* the South Carolina Court of Appeals affirmed the master's order requiring specific performance of the contract to will by the promisor.[78] This remedy was not quasi-specific performance, but actual specific performance.[79] The Court of Appeals ordered the defendant to make and not revoke a will leaving property to the plaintiff.[80] This is an unusual remedy.[81] In addition, the authority relied upon for this decision does not support compelling a promisor to make a will.[82] These authorities support quasi-specific performance[83] and are contrary to the decision in *Wright*.[84]

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72. *Id.* (citations omitted); *see also* Battuello v. Battuello, 75 Cal. Rptr. 2d 548, 550 (Ct. App. 1998) (allowing a cause of action during the testator's lifetime "where the promisor has made an inter vivos transfer of property specifically covered by the contract").

73. *See* Spinks v. Jenkins, 43 S.E.2d 586, 586-87 (Ga. Ct. App. 1947); Carter v. Witherspoon, 126 So. 388, 389 (Miss. 1930); Lipe v. Citizens' Bank & Trust Co., 178 S.E. 665, 666 (N.C. 1935).

74. SPARKS, *supra* note 2, at 85.

75. ATKINSON, *supra* note 43, at 216-17; KARESH, *supra* note 57, at 56-57.

76. Wood, *supra* note 63, at 1179.

77. ATKINSON, *supra* note 43, at 216-17; Wood, *supra* note 63, at 1181-84.

78. 329 S.C. 170, 173, 495 S.E.2d 222, 223-24 (Ct. App. 1997).

79. *See supra* notes 57-62 and accompanying text.

80. *Wright*, 329 S.C. at 173, 495 S.E.2d at 223.

81. *See* SPARKS, *supra* note 2, at 128-29; Johnston, *supra* note 26, at 658. In an earlier decision, the South Carolina Supreme Court mentioned in dicta that a promisor may be "precluded" from making a will not in conformity with the contract. *Ex parte* Hineline, 166 S.C. 352, 362, 164 S.E. 887, 891 (1932).

82. The court in *Wright* cited the following authority: 1 BOWE & PARKER, *supra* note 57, § 10.30, at 504; KARESH, *supra* note 57, at 56; THOMPSON, *supra* note 25, at 28. *See Wright*, 329 S.C. at 183-84, 495 S.E.2d at 229.

83. *See supra* notes 57-62 and accompanying text.

84. One authority discusses remedies during the lifetime of the testator, but this source mentions (1) an injunction to restrain an inter vivos transfer of the subject property, (2) an action for damages at law for anticipatory breach, and (3) an action for restitution. KARESH, *supra* note 57, at 57. There is no support for compelling a testator to make a will. *See id.* at 56-

Compelling a promisor to make a will conforming to a contract is not an appropriate remedy for breaching a contract to make a will. Even though a court of equity has broad powers in fashioning a remedy,[85] there is overwhelming support that a court of equity cannot compel a person to make or revoke a will.[86] By compelling Trask to make a will, the South Carolina court has added to the confusion in this area of the law.[87] According to Professor Sparks:

> Neither an action for an affirmative injunction to compel the execution of an appropriate will nor an action to enjoin the execution of an inconsistent will or to prevent the revocation of a will already executed should be entertained. Even if relief of this type is granted it is incapable of enforcement and cannot give the promisee any effective protection.[88]

Although the result seems fair in *Wright*, this same result could have been accomplished without focusing on the will itself.[89] In cases like *Wright*,

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57. Another authority cited by the court refers to an action of quasi-specific performance and offers no support for compelling a promisor to make a will. 1 BOWE & PARKER, *supra* note 57, § 10.30, at 504 ("It is, of course, not technical specific performance, since there is no attempt to compel the promisor to make a will."). Yet another authority cited by the court is also contrary to the decision. THOMPSON, *supra* note 25, § 16, at 28 ("Most courts hold that under such contracts the promisor can not be compelled to execute a will, nor can he be prevented from revoking one, since the contract is not treated as rendering an existing will irrevocable or as depriving the promisor of his legal testamentary rights.").

85. Wood, *supra* note 63, at 1169 ("'[C]ourts of equity are not bound to give any stereotyped form of relief. They readily adapt the relief to the peculiar facts of the case, and their sole concern is that the decree entered shall effectuate justice.'" (quoting Chantland v. Sherman, 125 N.W. 871, 874 (Iowa 1910))).

86. *See supra* note 43 and accompanying text; *see also* Wood, *supra* note 63, at 1169 ("[A] court of equity [is] without the power to compel a person to execute a will . . . .").

87. *See* SPARKS, *supra* note 2, at 194-95.

88. *Id.* at 195 (footnote omitted).

89. As stated by Professor Sparks:

> [I]t should be noted that the relief available depends upon the usual principles of contract law, and the fact that the thing bargained for is the making of a will does not within itself give any special significance to the transaction. The substance of the thing agreed upon is the transfer of property to the promisee at the death of the promisor. The remedy granted by the courts seeks either to accomplish that result or to award damages for its failure.

Id. at 197.

the court is enforcing a contract right,[90] and the contract stated that Wright would get the ranch, cattle, and equipment when Trask died if Wright came to live on the ranch.[91] The court also stated that Trask's subsequent wills disinheriting Wright, made after he entered into his contract with Wright, were breaches for which Wright could have brought suit.[92] This is completely contrary to the established principle that promisors have their entire lifetime to perform their side of the testamentary bargain.[93]

The court could have considered the grandfather's actions in *Wright* to be an anticipatory repudiation, because he fired his grandson.[94] The South Carolina Supreme Court ruled in *Harmon v. Aughtry* that if a promisor repudiates a contract, the promisee can obtain immediate relief.[95] Trask's revocation of the will conforming to the contract would probably not be anticipatory repudiation because Trask would have the rest of his life to rewrite the will in accordance with the contract.[96] However, firing Wright could be a clear indication that Trask repudiated the contract. But the *Wright* court did not cite *Harmon*, nor did the court mention anticipatory repudiation.

Several alternative remedies were available to the court in *Wright*. The court could have denied equitable relief and awarded money damages for anticipatory breach of contract.[97] However, relief at law is granted only when the remedy is "clear, adequate, and complete."[98] In *Wright* a remedy at law would not have been adequate because estimating the value of Wright's services would be difficult, and money damages could not replace the unique character of the ranch, equipment, and cattle promised to Wright.[99]

As the court noted in *Wright*, equitable, not legal, remedies are usually awarded to a promisee in a contract to make a will.[100] Two equitable remedies available during the promisor's lifetime are an injunction and a constructive trust.[101] The court in *Wright* awarded injunctive relief to the promisee, Wright.[102] The court enjoined Trask from "alienating, encumbering or

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90. *See supra* note 44 and accompanying text.

91. Wright v. Trask, 329 S.C. 170, 177, 495 S.E.2d 222, 226 (Ct. App. 1997).

92. *Id.* at 180, 495 S.E.2d at 227.

93. *See* Harmon v. Aughtry, 226 S.C. 371, 375, 85 S.E.2d 284, 285 (1955); *see also supra* note 43 and accompanying text.

94. *Wright*, 329 S.C. at 175, 495 S.E.2d at 225.

95. *Harmon*, 226 S.C. at 375, 85 S.E.2d at 285-86.

96. It is unclear exactly what would constitute repudiation. Conveying property subject to a contract to will to a third party is given as one example in *Harmon*. *Id.*

97. KARESH, *supra* note 57, at 57; Wood, *supra* note 63, at 1190-96.

98. 1 BOWE & PARKER, *supra* note 57, § 10.35, at 516.

99. *See id.* § 10.35, at 514-16 (stating that relief in equity is usually granted when a conveyance of property is involved and where one person has devoted a great amount of time and energy rendering personal services to another).

100. 329 S.C. 170, 183, 495 S.E.2d 222, 229 (Ct. App. 1997).

101. Wood, *supra* note 63, at 1168.

102. 329 S.C. at 173, 495 S.E.2d at 223-24.

disposing of any of the real estate."[103] More importantly, the court ordered Wright to return as manager of the ranch.[104] Other courts have also applied this type of injunctive relief.[105] According to one commentator, "courts . . . have granted injunctive relief to maintain the status quo and permit the promisee to continue in the performance of his contract and to restrain the promisor . . . from disposing of the property in violation of the contract."[106]

It appears the *Wright* court ordered Trask to make a will to ensure that Wright's interest in the property would be protected. A constructive trust placed upon the ranch for the benefit of Wright, however, seems to be a more appropriate remedy and less likely to create confusion in this area of the law. A constructive trust is a creation of the courts where a "holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest."[107] A constructive trust is "not a trust in which the trustee is to have duties of administration lasting for an appreciable period of time, but rather a passive, temporary trust, in which the trustee's sole duty is to transfer the title and possession to the beneficiary."[108] Other courts have awarded relief in the form of a constructive trust to protect the interests of the promisee when a promisor breaches a contract to make a will.[109] Had the *Wright* court used this remedy, it would have allowed Trask to stay on the farm for the rest of his life and would have adequately protected Wright's interest in the property. The remedy of a constructive trust would have provided greater protection of Wright's interest than the remedy of compelling Trask to make a will. Wright could always make a secret will or could secretly revoke the conforming will. A court of equity simply does not have the ability to enforce a remedy of this kind.[110]

Although, considering the facts, the result seems fair in *Wright*, the more traditional remedy of a constructive trust placed upon the property for the benefit of the promisee would have achieved the same result as compelling the promisor to make a will, without creating as many problems.[111] The important point is that if a valid contract exists, promisees should receive the property to which they are entitled.[112]

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103. *Id.*

104. *Id.*

105. *See* Wood, *supra* note 63, at 1178-81; 81A C.J.S. *Specific Performance* § 207 (1977).

106. Wood, *supra* note 63, at 1179.

107. 89 C.J.S. *Trusts* § 139, at 1015 (1955). *See generally* GEORGE GLEASON BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 77, at 287-90 (5th ed. 1973) (explaining constructive trusts).

108. BOGERT, *supra* note 107, § 77, at 288.

109. *See, e.g.*, Brackenbury v. Hodgkin, 102 A. 106, 107 (Me. 1917); Matheson v. Gullickson, 24 N.W.2d 704, 709-10 (Minn. 1946); Wood, *supra* note 63, at 1181-84.

110. *See supra* note 43 and accompanying text.

111. *See supra* notes 107-09 and accompanying text.

112. *See supra* note 89 and accompanying text.

IV. CONCLUSION

The remedy in *Wright v. Trask* has the potential to cause more confusion in an already difficult area of the law. The court enforced a contract to make a will during the promisor's lifetime without discussing that most courts do not allow suits during the promisor's lifetime and without mentioning South Carolina precedent regarding suits brought during the testator's lifetime. The court also compelled a promisor to make and not revoke a will, which is contrary to established principles of law. The authorities given to support this decision are unpersuasive—and even contradictory to the court's resolution. Placing a constructive trust on the property for the benefit of Wright would have adequately protected his future interest in the property while avoiding unnecessary confusion.

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